UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL NO.: 3:09-CR-85-S
-- Electronically Filed --

KAREN CUNAGIN SYPHER DEFENDANT

UNITED STATE'S REPLY TO SYPHER'S RESPONSE TO MOTION FOR PROTECTIVE ORDER

The United States respectfully makes this reply to the defendant's response to the United States' Motion for Protective Order. In her Response, the defendant argues that a protective order is inappropriate for two reasons: (1) the proposed order is actually a unilateral gag order to prevent the defendant from speaking to the media, and (2) the United States has failed to show good cause for a protective order. Neither of these arguments have merit.

(1) The protective order sought by this motion is not a gag order, but seeks only to restrict dissemination of material produced in this action pursuant to Fed.R.Crim.P. 16, pursuant to *Brady v. Maryland* or *Giglio v. United States*, or pursuant to 18 U.S.C. § 3500.

In her Response, the defendant states "[t]he United States proposal [for a protective order] is really aimed at preventing Sypher from speaking to the media." Response, p 3. Plainly, this assertion mischaracterizes the motion before the Court. Both the Motion and the tendered Protective Order are narrowly drawn to forbid only the dissemination of material and the contents of material produced in this case by the United States.

The Response appears to characterize the relief sought by the United States as a "blanket order restraining speech" so as to argue against a motion that was never put before the Court. In making the argument against a gag order, the defendant cites *United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993), a case in which a district court *sua sponte* imposed a blanket prohibition against the attorneys making any statements that "have anything to do with this case" or even "may have something to do with the case." *Id.* at 447. Though the Second Circuit vacated that blanket gag order, it indicated in the opinion that a less restrictive order to mitigate the prejudicial publicity might well have been appropriate: "We do not mean to imply that the district court may not in the future determine . . . that circumstances exist requiring the imposition of restrictions designed to protect the integrity of the judicial system and the rights of the defendants to a fair trial, and enter an order that is no broader than necessary to achieve those ends." *Id.*

A district court has, in fact, an obligation to impose such narrowly restrictive orders when pretrial publicity potentially affects a defendant's right to a fair trial. "The [Supreme] Court has placed an *affirmative duty* on trial courts to guard against prejudicial pretrial publicity." *United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir. 1990) (emphasis in original). In *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, (1979), the Supreme Court stated:

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

The obligation of the trial court to protect against prejudicial pretrial publicity exists even if the defendant is responsible for generating that publicity:

> If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, ***the accused***, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (emphasis added).

It may very well be appropriate for the Court to enter an order in this case to limit the parties – including, especially, the defendant – from discussions of the details of the facts underlying this case. Such an order would protect both the process and the defendant from prejudice.

Notwithstanding this, the United States does not seek such a broad order at this juncture. Though such an order would certainly reduce further potential prejudice from unwarranted pretrial publicity, it would not unring the bell already rung by the defendant. If a broader order is appropriate to limit additional publicity, the United States leaves that remedy to the discretion of the Court. Indeed, the Court "may . . . in the future determine . . . that circumstances exist requiring the imposition of restrictions designed to protect the integrity of the judicial system and the rights of the defendants to a fair trial, and enter an order that is no broader than necessary to achieve those ends." *Salameh*, 992 F.2d at 447.

But what the United States seeks here is a simple, narrow measure to prevent further potential publicity and prejudice that might arise from publication of additional prospective evidence.

(2) The United States has shown good cause for a protective order based upon the facts proffered in its Motion.

In her Response, the defendant insists that the United States has failed to show good cause for its motion for a protective order. She denies having any responsibility for the pretrial publicity in this case, and instead blames the United States for the more significant disclosures of details of this case. She denies also that she had provided the media with any discovery previously produced by the United States. These statements in her Response are both false and misleading. Moreover, they do not go to the multiple bases underlying the United States's motion.

(a) False and misleading assertions concerning pretrial publicity in the Response

(1) The defendant has provided discovery materials to the media.

The Response states: "[t]o date, no discovery materials provided by the United States to defense counsel have been 'disseminated, distributed or revealed' by Sypher or her counsel." This statement is false.

As stated in the United States Motion for Protective Order, the defendant, Karen Sypher, provided discovery produced by the United States to the media. According to WDRB Fox 41, on or about July 27, 2009, the defendant accepted the invitation of a WDRB Fox 41 reporter to provide the station with materials she had obtained in connection with the federal criminal case. Among other materials, the defendant provided the news station a recording of voicemails that

had been left on Rick Pitino's cell phone. This recording had been produced to the defendant as part of discovery. According to information available on the WDRB Fox 41 website, that outlet reported on the content of the recorded voicemails on July 27, 2009 and July 31, 2009. Those recorded voicemails were played on an exclusive broadcast on or about those dates.

The United States had produced the recording of these voicemails to Sypher's prior counsel, Thomas Clay, on or about May 22, 2009. The recording of the voicemails had been made by counsel for Rick Pitino. Neither Pitino nor anyone on his behalf had provided a copy of the recording to the defendant at any time. The recording had come into the defendant's possession through discovery and by no other means.

The defendant's assertion that she released no discovery materials to the media is false.

(2) The United States had no involvement in the release of any LMPD investigative material under the Kentucky Open Records Act.

The Response states: "the United States . . . released Sypher's interview with LMPD." Response, p 2. This statement is false. The Response also states: "the United States . . . released Rick Pitino's interview with LMPD under the guise of the Kentucky Open Record Act." This statement is also false.

As reported by the media outlets that reported on the defendant's interview with LMPD, the news media obtained the Sypher police interview from LMPD by making a request via the Kentucky Open Records Act. The media reporting on the substance of Pitino's interview also reported that the information had been obtained from LMPD via the Kentucky Open Records Act.

The Kentucky Open Records Act, codified at KRS 61.870 *et seq.*, requires public agencies – including law enforcement agencies such as LMPD – to make records public upon request by any member of the media or public. Law enforcement agencies are exempt from the requirement to produce records related to ongoing investigation, but once an enforcement action is completed or – as here – "a decision is made to take no action," then the records must, absent any other exemption, be produced when requested. KRS 61.878(1)(h).

The Kentucky Open Records Act applies only to Kentucky state and local agencies and does not apply to agencies of the United States. The United States has no role in administering the Act, which is within the purview of the Commonwealth of Kentucky, a sovereign entity distinct from the United States.

As to the public production of LMPD investigative materials by LMPD, the United States had no involvement in the Open Records request or the response to the request. The United States was not consulted concerning the response to any request for made to the production of the interviews or other investigative materials under the Open Records Act. The defendant can have no good faith basis for any assertion or even suggestion to the contrary.

(3) The defendant misleads the Court by denying any responsibility for pretrial publicity.

Since April, 2009, the defendant has vigorously sought to have media outlets report her scandalous allegations of multiple rapes and a forced abortion. These allegations are intimately related to the charges set forth in the Indictment. A number of media outlets reported that the defendant provided them interviews and made claims about Pitino, but those outlets would not publish her claims. News articles and reports repeatedly stated that Sypher's allegations would

not be printed or broadcast because they could not be corroborated and had not been reported to police.

Finally, the defendant – apparently frustrated by her inability to have her allegations publicized – visited the LMPD Sex Crimes Squad to report her six-year old allegations. When she finally went to the police, she did so only after making arrangements for a camera crew to be present for her arrival.

When the Commonwealth Attorney's Office declined any prosecution based on the defendant's allegations against Pitino, the investigating officers closed the investigation. This circumstance ended the law enforcement exemption for production of records under the Open Records Act. Media outlets requested the investigative materials, and the defendant's story was finally published, finding its way into the headlines and lead broadcast stories. This is the result and end sought by the defendant and by no other party, victim or witness. This publicity was the doing and intended objective of the defendant, and it is patently misleading to attempt to shift responsibility to any other person or entity.

(b) Multiple bases for the United States' Motion for Protective Order

The defendant argues in her response that she should not be subject to a protective order because she is not responsible for the pretrial publicity. The concern over pretrial publicity is only one of the reasons that a protective order is necessary here. Each of the United States's grounds for the motion – each independently sufficient to constitute good cause – are set forth below.

(1) Pretrial publicity potentially prejudices the defendant's right to a fair trial by creating impressions about the facts of the case and the defendant herself.

As discussed above in Section (2)(b)(3) of this Reply, the defendant has vigorously sought pretrial coverage of her allegations that formed the basis of extortionate threats made to Pitino. Also, as discussed in Section (2)(b)(1) of this Reply, the defendant has not only given interviews to promote pretrial media coverage but also has disseminated to media outlets materials produced to her in discovery. The dissemination of those materials resulted in additional pretrial stories on July 27, 2009 and July 31, 2009.

Entry of the protective order will not prevent the defendant from giving additional interviews to the media, but will, at least, forbid her from disseminating additional discovery, thereby triggering more pretrial stories. Discovery yet to be produced includes additional recordings and telephone records. The telephone records will reveal the calls made between various persons around the time of the charged conduct. The recordings concern conversations intimately related to the charged events. If received by media outlets prior to trial, these materials would almost certainly be the subject of additional news stories.

Further publication of these discovery materials would expand the awareness of the public at large and the potential jury pool in particular of the facts and potential evidence in the case. The materials could lead potential jurors to form pretrial opinions about the case and to form opinions about the defendant herself.

A protective order of the nature of the one sought here will preclude the possibility of any prejudice to the defendant arising from additional pretrial publicity stemming from the further disclosure of discovery materials.

(2) Public dissemination of discovery could result in the disclosure of potentially inadmissible evidence to prospective jurors.

Much of the discovery yet to be produced is comprised of evidence that may be offered at trial. Consequently, public dissemination of these materials will reveal potential evidence to potential jurors in advance of trial – and in advance of any opportunity to object to the evidence and in advance of the Court ruling on its admissibility. The prospect of a voir dire proceeding where the Court must sift through potential jurors' awareness of every item of potential evidence can simply be avoided by entry of a protective order.

Though the defendant in her Response argues that she should not be denied her access to the press, she has not argued for a protected right to publicly disseminate potential evidence.

(3) Public dissemination of private information about victims and witnesses in this case can be curtailed by a protective order.

The defendant does not address in any respect the privacy concerns raised by the United States in its motion. Much information of a private nature appears in the telephone records to be produced. For example, the telephone records could be used in conjunction with publicly available "reverse look-up" technology to determine the identity of persons who have been communicating with the defendant, the victim, and certain witnesses in this case. The number, duration and frequency of telephone calls between various persons would unnecessarily be available for scrutiny. Moreover, the records also reflect private, unlisted numbers of persons involved in this case.

There is little justification in making such private information public. The entry of a protective order can readily and effectively address this concern, with no prejudice to either party.

(3) There exists no basis to subject the United States to a Protective Order, but the United States nevertheless would not object to being bound by an order preventing all parties from disseminating discovery materials.

In her response, the defendant complains about the unilateral nature of the protective order sought by this motion. The United States sought the unilateral order because the defendant is the only party to have disseminated discovery materials to the media. Because the United States has disseminated no discovery materials or other potential evidence, there are no concerns about its actions that need to be addressed by an order or otherwise.

Notwithstanding this situation, in the interest of comity and equableness, the United States is willing to be bound – along with the defendant – by a mutually binding protective order. In fact, prior to the filing of this Motion, the United States sought an agreed protective order concerning dissemination of discovery that would bind both parties equally. The parties unfortunately failed to reach any agreement, a failure that resulted in the filing of this Motion.

CONCLUSION

In opposing this Motion for a Protective Order, the defendant is simply fighting to protect her ability to disseminate discovery and other materials to the media before trial – nothing more nor less. This is not a legitimate purpose deserving of any protection whatever.

The proffered Protective Order does not prevent the defendant or her counsel from speaking to the media about this case. It merely limits the harm from publication of potential evidence and private information, with no prejudice to any party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I electronically filed the foregoing and accompanying Order with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: James Earhart, 517 W. Ormsby Avenue Louisville, Kentucky 40203.

s/ *John E. Kuhn, Jr.*
John E. Kuhn, Jr.
Assistant United States Attorney